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## EUROPE'S CRISIS OF VALUES\*

Dimitry Kochenov\*\*

## Abstract

This contribution outlines the special features of the Rule of Law crisis of the European Union which started in Hungary. It argues that the crisis of values is the first systemic challenge to the very essence of the process of European integration since the foundation of the project. The key features of the crisis are analyzed as well as the reasons that led to the crisis, focusing not only on the EU's powerlessness to resolve it in terms of procedures and enforcement, but also on the justice void, which looms beyond the internal market, making EU's substantive involvement – indispensable for the successful resolution of the crisis – overwhelmingly difficult. The main point is very simple: the crisis of values is something new and its importance should be realized in full, as it corrupts the core assumptions about the EU indispensable for Europe's successful functioning.

Key words: Justice; values; enforcement; Article 2; crisis; Rule of Law.

## LA CRISI DE VALORS EUROPEA

## Resum

*Aquest article subratlla els trets especials de la crisi de l'estat de dret a la Unió Europea que va començar a Hongria. Sosté que la crisi de valors és el primer desafiament sistèmic a l'essència del procés d'integració europeu des de la fundació del projecte. S'analitzen els aspectes clau de la crisi així com les raons que hi van portar, centrant-se no solament en la manca de poder de la UE per resoldre-la en termes de procediment i execució, sinó també en el buit legal, que plana més enllà del mercat intern, i que fa que la implicació substantiva de la UE —indispensable per a la resolució reeixida de la crisi— sigui extremadament difícil. L'argument principal és molt simple: la crisi de valors és un fet nou i la seva importància s'hauria de considerar en tot el seu abast, per tal com corromp les premisses bàsiques de la UE indispensables per al bon funcionament d'Europa.*

*Paraules clau: justícia; valors; execució; Article 2; crisi; estat de dret.*

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## 1 Introduction

Giorgio Agamben is right suggesting that in the current global model of constitutionalism the concept of 'crisis' has acquired preeminence.<sup>1</sup> Especially when conceptualized through the prism of 'security', the notion of 'crisis' is at the core of modern constitutionalism, where 'a formal state of exception is not declared and we see instead that vague non-judicial notions ... are used to instaure (sic) a stable state of creeping and fictitious emergency without clearly identifiable danger'.<sup>2</sup> Approached in this vein – and such an approach seems most reasonable – the history of the EU can be retold as a permanent crisis history, where crises are but quotidian elements of the day-to-day, *de facto* deprived of the sense of real emergency. In this sense, European constitutionalism certainly follows the global trend – current law and politics is by definition based on the dismissal of the idea of the 'ordinary' in its traditional understanding, as crisis, in Agamben's words, 'coincides with normality and becomes, in this way, just a tool of government'.<sup>3</sup> This profoundly undermines the special nature of what we used to call a crisis – if not dismisses crises' seemingly essential element, which is pressing urgency:

'Besides the juridical meaning of judgment in trial, two semantic traditions converge in the history of this term which, as it is evident for you, comes from the Greek verb *crino*: a medical and a theological one. In the medical tradition, *crisis* means the moment in which the doctor has to judge, to decide if the patient will die or survive. The day or the days in which this decision is taken are called *crisimoi*, the decisive days. In theology, *crisis* is the Last judgment pronounced by Christ in the end of times. As you can see, what is essential in both traditions is the connection with a certain moment in time. In the present usage of the term, it is precisely this connection, which is abolished. The crisis, the judgment is split from its temporal index and coincides now with the chronological course of time'.<sup>4</sup>

To say 'constitutionalism in crisis' is, following Agamben, to say nothing, or, to be more precise, to state that constitutional events stay their course, as always based on the fictitious notion of danger, which is not co-extensive with any real emergency: life as normal.

The ambition of this brief contribution is to demonstrate that one recent development in the sea of EU's ordinary crises big and small<sup>5</sup> is radically different and potentially more dangerous than all the 'quotidian' crises usually considered in the literature – even the one related to the troubles of the Economic and Monetary Union (EMU).<sup>6</sup> The focus is on the crisis of the Rule of Law<sup>7</sup> and other values in the Union and its potentially extremely far-reaching consequences for the essence of the European integration project as well as for the Union which is being built in Europe. The literature offers different typologies of EU's crises, of which the one by Agustín Menéndez is probably the most persuasive, speaking of *five* interrelated crises, rather than one.<sup>8</sup> What this contribution intends to do – instead of offering a new categorization or periodisation of the recent crisis events – is to make a strong emphasis on the importance of the crisis of values which is evolving in Europe, which is often underplayed, if not forgotten, next to the EMU crisis.

1 Agamben, G., 'For a Theory of Destituent Power', *Chronos*, 2014, available online at [www.chronosmag.eu](http://www.chronosmag.eu).

2 Id.

3 Id.

4 Id.

5 For the most majestic analysis of the recent crises in EU law available in the literature see Menéndez, A. J., 'The Existential Crisis of the European Union', 14 *German Law Journal*, 2013, 453.

6 Amtenbrink, F., 'Europe in Times of Economic Crisis: Bringing Europe's Citizens Closer to One Another?', in: Dougan, M., Nic Shuibhne, N., and Spaventa, E. (eds.), *Empowerment and Disempowerment of the European Citizens*, Oxford: Hart Publishing, 2012, 171; Adamski, D., 'Europe's (Misguided) Constitution of Economic Prosperity', 50 *Common Market Law Review*, 2013, 47; Menéndez, 'The Existential Crisis...', *op cit.*; Menéndez, A. J., 'Editorial: A European Union in Constitutional Mutation?', 20 *European Law Journal*, 2014, 127.

7 This wording is borrowed from the characterisation of the Hungarian situation in a Fundamental Rights Agency's Report: *Fundamental Rights: Challenges and Achievements in 2012*, Vienna: FRA, 2013, 22–25.

8 Menéndez, 'The Existential Crisis...', *op cit.*, 454.

It is suggested that for the first time since the start of integration Europe is facing a crisis in the old – i.e. pre-Agambenian – sense of the word: an acute disruption of the very basis of the system of EU law at both the national and the supranational level,<sup>9</sup> able to inflict radical harm on the whole integration construct as well as the individual constituent elements of it. It is suggested that the crisis of values and the Rule of Law at the national level, which immediately affects the supranational level of the law is a rare example of a *real* systemic crisis. Overcoming it is a matter of immediate urgency for the survival of the EU as we know it.<sup>10</sup> How to do this remains as of yet unclear.<sup>11</sup>

## 2 Structure

Following a brief look at the rich pattern of crises in EU's integration history, this contribution turns to outlining three key elements of the current values / Rule of Law crisis, which make it special. The contribution then considers the question of the reasons behind the European integration project, which clearly acquires a new angle of acuteness in the context of the values / Rule of Law crisis. The piece then proceeds to make three interrelated arguments to come to an uneasy conclusion. This contribution will not make an attempt to resolve the crisis, limiting its ambition to outlining its crucial implications for the functioning of the Union. Doing this is indispensable, as the importance of what we are facing has clearly not been grasped as of yet by the institutions of the Union or the Member States. This is in marked contrast with the crisis of the EMU, where a number of crucial steps have been taken to remedy the situation, profoundly altering the system of EU constitutionalism. It goes without saying that such steps can be criticized in substance. Their very presence, however – as well as their relative swiftness – points to the realization of the crisis' negative potential as well as a desire to deal with it constructively. Something we precisely do *not* see in the case of the crisis of values, numerous rather timid attempts to deal with it notwithstanding.<sup>12</sup>

Firstly, building on a detailed analysis proposed elsewhere<sup>13</sup> it is recalled that the initial, most ambitious and over-encompassing idea behind the Union got hijacked by the Internal Market. The latter was intended as a means, not as an end in itself, exposing a justice void at the basis of the Union.<sup>14</sup>

Secondly, it is argued that, unlike is the case with states, the Union is not equipped, legally or politically, with a viable capacity to defend its founding idea. This is true notwithstanding whether one believes or not that such an idea could at all be deciphered and formulated with clarity. Indeed, the EU seems particularly vulnerable in relation to the founding values, since what it was designed to protect and to fight for is, essentially, the *acquis*, nothing more.<sup>15</sup> This is bad news for European integration, as is explained in a brilliant J. H. H.

9 On the interactions between the two see e.g. Robert Schütze's vein: Schütze, R., *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009.

10 Müller, J.-W., *Safeguarding Democracy inside the EU. Brussels and the Future of the Liberal Order*, Washington DC: Transatlantic Academy Paper Series, 2013.

11 For some ways to approach the crisis see Closa, C., Kochenov, D., and Weiler, J. H. H., 'Reinforcing Rule of Law Oversight in the European Union', *EUI Working Paper RSCAS 2014/25* (EUI Florence), 2014 and the literature cited therein. See also von Bogdandy, A. et al, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States', 49 *Common Market Law Review*, 2012, 489; Müller, *Safeguarding Democracy...* (2013), *op cit.*; Scheppele, K. L., '[What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions](#)' (2013); Kochenov, D., 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', *Polish Yearbook of International Law*, 2014 (forthcoming).

12 The concrete outcomes of these include, chiefly – and besides expert opinions and reports, the Commission's proposed 'Pre-Article 7' procedure (*op cit*), two cases won by the Commission against Hungary (Case C-288/12 of 8 April 2014 and Case C-286/12 of 6 November 2012) and a realisation that little can be done within the framework of the current *acquis*. For a general overview, see, Dawson, M. and Muir, E., 'Hungary and the *Indirect* Protection of EU Fundamental Rights and the Rule of Law', 14 *German Law Journal*, 2013, 1959.

13 Kochenov, D., 'The Citizenship Paradigm', 15 *Cambridge Yearbook of European Law and Policy*, 2013, 196.

14 For an analysis, see, Kochenov, D., de Búrca, G., and Williams, A. (eds.), *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2014 (forthcoming).

15 Williams, A., 'Taking Values Seriously: Towards a Philosophy of EU Law' 29 *Oxford Journal of Legal Studies*, 2009, 549.

Weiler's conceptualization: the market is now 'alone', 'without a mantle of ideas'.<sup>16</sup> Even peace<sup>17</sup> and now prosperity<sup>18</sup> are questionable. Instead of equality, we are offered 'inclusion'.<sup>19</sup>

Thirdly, it is argued that the lacking initial idea coupled with a lack of any ability to defend it – however blurred it might be – obscured the very essence of all the integration exercise. This obvious problem is particularly acute especially in the context of the Union's constant growth, where a growing number of the Member States came to look at it – though not in discord with its original supranational mission, one could argue – as a likely guarantor of their own adherence to democracy, the Rule of Law and human rights protection.<sup>20</sup> In doing this, they allowed the Union's ephemeral values, potentially, to take the place of their own, should any trouble occur – a most unworkable substitution, as it turns out. General trust in the EU, which seems to be widespread among some Member States thus exacerbates the justice problem.

The piece concludes that the EU, which is not a justice actor, as it has been hijacked by market ideology, unable to meet expectations directed towards it and toothless in protecting the essential core of what European integration is about – the *values* of democracy, the Rule of Law and human rights protection – is facing the most serious 'real' crisis in its history. The extraordinary nature of the current crisis, coupled with its overwhelming transformative potential – as it pushes us to rethink what the Union is about and stands for – has to be stated and clearly acknowledged, which is the key task of this paper.

### 3 Crises are EU history

'European Union' and 'crises' are words that unquestionably go together. Throughout its history, the Union experienced a number of crisis stages – from the Luxembourg compromise<sup>21</sup> and the failure of the European Defence<sup>22</sup> and the European Political Community Treaties<sup>23</sup> leading to the market integration model as we know it today,<sup>24</sup> to decolonization – an unprecedented crisis for the Union, which hoped to become nothing less than Eurafrica.<sup>25</sup> Not to be forgotten are the numerous failures of direct popular legitimation at the Member State level:<sup>26</sup> failed referenda now form a long list – not merely extreme deviations from the general norm of virtually universal acceptance.<sup>27</sup> The EU has not only learnt from the crises – learning does not merely mean the rebranding of the Treaty Establishing a Constitution for Europe<sup>28</sup> to ensure its adoption in

16 Weiler, J. H. H., 'Bread and Circus: The State of the European Union' 4 *Columbia Journal of European Law* 223, 1998, 231.

17 Williams, A., *The Ethos of Europe*, Cambridge: Cambridge University Press, 2010, Ch 2.

18 Nicol, D., 'Swabian Housewives, Suffering Southerners: The Contestability of Justice Exemplified by the Eurozone Crisis', in Kochenov, D., de Búrca, G., and Williams, A. (eds.), *Europe's Justice Deficit?*, Oxford: Hart Publishing, 2014 (forthcoming).

19 Somek, A., 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique', in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*, *op cit*.

20 Sadurski, W., *Constitutionalism and the Enlargement of Europe*, Oxford: Oxford University Press, 2012.

21 The question whether the Luxembourg compromise is to be formally regarded as part of the *acquis* is still debatable: Delcourt, C., 'The *acquis communautaire*: Has the Concept Had Its Day?', 38 *Common Market Law Review*, 2001, 829.

22 European Defence Community Treaty (EDC), signed 27 May 1952 (never entered into force). See also Ruane, K., *The Rise and Fall of the European Defence Community*, Basingstoke: Palgrave, 2000.

23 Draft Treaty Embodying the Statute of the European Community adopted by the *ad hoc* Assembly, Strasbourg, 10 March 1953. Political Community Treaty. See also Griffiths, R.T., 'Europe's First Constitution: The European Political Community, 1952–1954', in Martin, S. (ed.), *The Construction of Europe: Essays in Honour of Emile Noël*, Dordrecht: Kluwer Academic Publishers, 1994, 19.

24 Kochenov, 'The Citizenship Paradigm', *op cit*.

25 Hansen, P., and Johnsson, S., 'Imperial Origins of European Integration and the Case of Eurafrica: A Reply to Gary Marks' "Europe and Its Empires"', 50 *Journal of Common Market Studies*, 2012, 1028; Custos, D., 'Implications of the European Integration for the Overseas', in Kochenov, D. (ed.), *EU Law of the Overseas*, The Hague: Kluwer Law International, 2011.

26 In general on the politics of ratification see Closa, C., *The Politics of Ratification of EU Treaties*, London: Routledge, 2013.

27 See, e.g., Conti, N., *Party Attitudes towards the EU in the Member States: Parties for Europe, Parties against Europe*, London: Routledge, 2013. See also Walker, N., 'After the Constitutional Moment', *Federal Trust Paper* No. 32/03, 2003.

28 Treaty Establishing a Constitution for Europe, signed on 29 October 2004 (never entered into force), OJ C 310/1, 2004. See also Amato, G., Bribosia, H., and De Witte, B. (eds.), *Genèse et destinée de la Constitution européenne*, Bruxelles: Bruylant, 2007.



the undecipherable Lisbon form. Born from the huge cataclysm of a World War, the Union has been learning from its mistakes, crucially, in terms of substantive policies and constitutional solutions it implemented. This came to light on numerous occasions – from the Spaak Report<sup>29</sup> to the Jacques Delors' *relance européenne* and, ultimately, to the growing non-market component of integration,<sup>30</sup> not to forget the rising awareness of the masses concerning the existence of supranational law, testing the blessing of the reversal of the act of acceptance.<sup>31</sup> Among the last additions to the long and in many senses formative, crises' list underpinning the history of EU integration is the crisis of the EMU.<sup>32</sup>

All these crises, enjoying varying levels of ugliness, as well as varying levels of difficulties connected with finding the eventual solutions, have been marked by one commonality: although profoundly problematic, and even potentially lethal for the European integration's exercise, none of them affected the very nature of the Member States of the Union, shattering the founding assumptions on which Europe is built. In other words, these were the crises of rules and their implementation, the crises of governance and the measures responsible for the EU's design, *not* the crises of essential foundations,<sup>33</sup> going to the core of the essential features of the *Herren der Verträge*. This is why the situation currently observable in Hungary<sup>34</sup> and – to a varying degree – in a number of other Member States where the values of democracy and the Rule of Law seem to be systemically undermined,<sup>35</sup> do not easily compare, it is suggested, with all the EU's crises of the past. Liberal democracies are being legally dismantled in the EU in plain sight: Hungary with its new Constitution and hundreds of laws making it impossible for the ruling party to lose elections is a case in point. Broader implications for the whole region could also be drawn, however.<sup>36</sup>

We are dealing with something new. This new type of crisis is potentially infinitely more dangerous than all the instances branded as 'crises' in the past history of the European integration project. This is mostly for three reasons:

- 1 It has demonstrated that the assumptions on which the Union is built presupposing that its Member States abide by the values of democracy, the Rule of Law, human rights protection etc.<sup>37</sup> do not always hold true and can be just this: assumptions.

29 Comité intergouvernemental créé par la conférence de Messine, *Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères* (Mae 120 f/56 (corrigé), Brussels, 21 April 1956) (Spaak Report).

30 On the blurred lines between the 'market' and the 'non-market' facets of EU integration see e.g. Kochenov, D., and Plender, R., 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', 37 *European Law Review*, 2012, 369.

31 Weiler, J. H. H., *Constitution for Europe: 'Do the New Clothes Have an Emperor?'*, Cambridge: CUP, 1999, 3, 4.

32 See, e.g., Adams, M., Fabbrini, F., and Larouche, P. (eds.), *The Constitutionalisation of European Budgetary Constraints*, Oxford: Hart Publishing, 2014; Menéndez, 'Editorial...', *op cit*.

33 On EU values see, in particular, von Bogdandy, A., and Ioannidis, M., 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51 *Common Market Law Review*, 2014, 59. For the external aspects, see, Cremona, M., 'Values in EU Foreign Policy', in Evans, M., and Koutrakos, P., (ed.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, Oxford: Hart Publishing, 2011, 275; Leino, P., and Petrov, R., 'Between "Common Values" and Competing Universals', *European Law Journal*, 15, 2009, 654; Kochenov, D., 'The Issue of Values', in Petrov, R., and Van Elsuwege, P. (eds.), *The Application of EU Law in the Eastern Neighbourhood of the European Union*, London: Routledge, 2014, 46.

34 Bánkuti, M., Halmai, G., and Scheppele, K. L., 'Hungary's Illiberal Turn: Disabling the Constitution', 23 *The Journal of Democracy*, 2012, 138; Scheppele, K. L., 'The Unconstitutional Constitution', *New York Times*, 2 January 2012. For a discussion see Verfassungsblog's special feature [Hungary: Taking Action](#), 2013; Bugarcic, B., '[Protecting the Rule of Law in the European Union](#)', unpublished paper, 2013.

35 von Bogdandy, A., and Sonnevend, P. (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford: Hart Publishing, 2014. See also Dawson, M. and Muir, E., 'Enforcing Fundamental Values: EU Law and Governance in Hungary and Romania', *Maastricht Journal of European and Comparative Law*, 2012, 469.

36 Müller, J.-W., 'Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Members', *Foreign Affairs*, March/April 2014.

37 These are expressed in Article 2 TEU.

- 2 In a situation where such assumptions are not true to the facts, the basic functioning of the Union, which owes its whole dynamics to the reliance on these assumptions, is *impossible*: from the mutual recognition of court decisions and the assurance of the mechanics of the day-to-day operation of the Internal Market, to the common participation in the institutional structures, the Union is entirely reliant on the understanding that all of its Member States are 'good enough'. They are not.
- 3 The Union does not have any operable tools to change the situation 'back to normal' as it were, by pushing the Member States to respect the foundational principles of Article 2 TEU. This is notwithstanding the existence of the Article 7 TEU mechanism in the Treaties,<sup>38</sup> or the recent Commission's proposal on the 'pre-Article 7 TEU procedure'.<sup>39</sup> Worse still, the EU is actually incapable, by its own constitutional means, to fill the solemn proclamations of Article 2 TEU with substance. In other words, the failure we are dealing with is not merely procedural, as it goes to the core of what the Union stands for: its *raison d'être* question. Digging beyond the wording of the Treaties one risks finding a justice void: finding nothing.

Otherwise put, the EU seems powerless in front of a threat it could not anticipate: the fact that some Member States are not in line with the key principles undermines pretty much all the logical fabric of thick assumptions which made the very idea of the EU operational. The current crisis thus potentially calls the Union as such into question. The Union's fundamentals, the basics of integration, stand to be rethought.

#### 4 New old questions about the Union's essence

Following the growing number of serious discussions on what to do (or not) with Hungary given the current developments there<sup>40</sup> and in the light of the special features of the mounting crisis which make it unique in EU history, it seems high time to return to the very basic question on the reasons behind the Union in Europe. The question of Europe's *raison d'être* is as acute as ever now more than half a century into the project and is actively discussed for a good reason.<sup>41</sup> Answering this question is crucial – not only because such an answer could allow for a better legitimization<sup>42</sup> – if not justification<sup>43</sup> – of the integration project already in existence, but also, since it is likely to shed light on how to resolve some of the outstanding problems which the Member States and the Union are facing. In particular, this concerns the Union's role in dealing with the values / Rule of Law crises in the Member States.

Indeed, it has to be taken into account that the position of the supranational authority – notoriously famous for its democratic deficit and criticized for the missing underlying idea of the good to go beyond the Internal Market<sup>44</sup> – is overwhelmingly fragile. How can a Union, which could legitimately be presented as antithetical to justice and democracy, reshape the essential constitutional fundamentals of the *Herren der Verträge* unfaithful to the values of Article 2 TEU?<sup>45</sup> Will it be necessary to reinvent the integration construct first

38 Sadurski, W., 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', 16 *Columbia Journal of European Law*, 2010, 385.

39 European Commission, 'A New EU Framework to Strengthen the Rule of Law', Strasbourg, 11 March 2014, COM(2014) 158 final.

40 E.g. Bánkuti, Halmai, and Scheppele, 'Hungary's Illiberal Turn...' (2012), *op cit*.

41 Williams, A., *The Ethos of Europe*, Cambridge: Cambridge University Press, 2010; Neyer, J., *The Justification of Europe: A Political Theory of Supranational Integration*, Oxford: Oxford University Press, 2012; de Búrca, G., 'Europe's *raison d'être*', in Kochenov, D., and Amtenbrink, F. (eds.), *European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013; Kochenov, de Búrca, and Williams (eds.), *Europe's Justice Deficit?*, *op cit*.

42 Arnull, A., and Wincott, D. (eds.), *Accountability and legitimacy in the European Union*, Oxford: Oxford University Press, 2002.

43 Neyer, *The Justification of Europe...* (2012), *op cit*; Morgan, G., 'European Political Integration' 14 *Constellations*, 2007, 332; Sissenich, B., 'Justification and Identity in European Integration', 14; *Constellations*, 2007, 347 (for posing this issue and some important attempts).

44 Weiler, 'Bread and Circus...' (1998), *op cit*; Williams, 'Taking Values Seriously...' (2009), *op cit*; Kochenov, 'The Citizenship Paradigm' (2013), *op cit*.

45 J. H. H. Weiler's metaphor of living in a glass-house reflects this state of affairs very well: Closa, Kochenov, Weiler, 'Reinforcing



before this is to be made possible? Clearly, such a reinvention, presumably requiring explicit assent from all the Member States, is nothing short of impossible in a situation where precisely some of the Member States are at the heart of the problem. At the same time, will the Union be able to function – or to pretend to function – successfully, if nothing is done, given the disruptive potential of the three essential features of the on-going crisis as outlined above?

Crucially, what we are speaking about is not (only) an issue of scale. Although Hungary immediately comes to mind when the crisis of the Rule of Law and other Article 2 TEU values is invoked,<sup>46</sup> the situation in that Member State is merely an illustration of the extent of the vulnerability of the Union *in its entirety*, caused by a far-reaching systemic problem of the European Union's design and day-to-day functioning that stretches far beyond the *acquis*-enforcement issues. It is suggested that this systemic deficiency was bound to emerge sooner or later, whether in Hungary or elsewhere. Any other country could be in Hungary's place. Given the current level of interdependence between the Member States in the Union, each and every other Member State is harmed by such Hungaries significantly.

Make no mistake: the problems with the EMU are huge, the difficulties related to building the Internal Market were grave. Yet the crisis plaguing the Union due to the combination of all the three factors introduced above is something radically different and is seemingly entirely beyond the Union's control, as it deeply undermines the presumption of a democratic Member State based on the Rule of Law on which the whole world of EU integration rests. It thus necessarily points in the direction of the Union's *raison d'être*: is the Union about solving the constitutional conundrums of its Member States?

## 5 Value-implications of not being a state

Any state, even while usually taking its own existence for granted,<sup>47</sup> knows what it is for and where it comes from: school books are written to answer this basic question.<sup>48</sup> So should the question arise over a state's reason for being, the range of answers will most likely be quite narrow – from 'it has always been like this' to a long story in the vein of Renan's 'l'oubli [et] l'erreur historique'<sup>49</sup> – the given state's founding mythology.<sup>50</sup> Law is then put in place to reflect this mythology and defend it against any possible encroachments: false monarchs and deviant preachers will be decapitated, anti-revolutionaries expelled and the unpopular will lose elections.

Crucially, it is not only so that the law made in accordance with the cherished idea will be vehemently guarded by the State. The founding idea *as such* is necessarily protected, which is why all the checks and balances, judicial review, elections etc. as well as punishments for 'disloyalty'<sup>51</sup> are put in place. Any polity seemingly comes down to a certain vision of justice as well as its reflection in the law, combined with the protection of that particular vision – the founding idea – at the root.<sup>52</sup>

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Rule of Law Oversight in the European Union' (2014), *op cit*, 25.

46 See numerous works by Kim Scheppele, *supra*, outlining the situation there.

47 Davies, N., *Vanished Kingdoms*, London: Penguin Books, 2011.

48 Some states even create special institutions to prevent the 'falsification of history'. For an absurd example see e.g. Kommissija po protivodejstviju popytok fal'sifikatzii istorii (The Russian Presidential Commission to Counter the Falsification of History, established by Presidential Decree No 549 of 15 May 2009 (no longer sitting)).

49 Renan, E., 'Qu'est-ce qu'une nation?', 1882 (lecture delivered at the Sorbonne on 11 March 1882).

50 For an intriguing attempt to discover and analyze such issues in the EU context see Della Sala, V., 'Political Myth, Mythology and the European Union', 48 *Journal of Common Market Studies*, 2010, 1, 16.

51 Levinson, S., 'Constituting Communities through Words that Bind: Reflections on Loyalty Oaths', 84 *Michigan Law Review*, 1985–1986, 1440.

52 Speaking of the founding ideas, it is necessary to mention the drastically diminished choice of options open at the current state of ethical development of the democratic world: ethics, as currently understood, ensure that the list of no-go ways is ever-expanding, which can be viewed as a fundamental problem: Badiou, A. *Ethics: An Essay on the Understanding of Evil*, New York: Verso, 2001.

At first glance the same situation seems to be observable in the European Union: democracy, the Rule of Law, human rights protection – all that Article 2 TEU preaches, rose to prominence during the first decades of the Union's existence,<sup>53</sup> materializing from a cocktail of national courts' *de facto* blackmail,<sup>54</sup> basic common sense,<sup>55</sup> and paying respects to the obvious requirements of contemporary life and constitutionalism. Yet, the fact that Article 2 TEU is there does not actually remove acuteness from the question about the reasons behind the Union. It is not for nothing that when one thinks about the EU democracy or human rights protection would be the last things to come to mind, lagging far behind bananas,<sup>56</sup> motorcycle trailers<sup>57</sup> and even the prohibition to deport foreign prostitutes<sup>58</sup> (as long as they are not a burden on a social security system<sup>59</sup>). Crucially – and obviously – this is because democracy and the Rule of Law are *not* EU's founding ideas, or paraphrasing J. H. H. Weiler, not in EU's DNA<sup>60</sup> – left seemingly entirely to the Member States.<sup>61</sup> Moreover, justice considerations, if in use, make up arguments for democracy's irrelevance, as Menéndez has shown.<sup>62</sup> What we have then, what the DNA *is* about, is seemingly the Internal Market – EU citizenship, although making clear progress,<sup>63</sup> unquestionably falls short of taking the glorified place of the Internal Market in the EU's DNA.<sup>64</sup> While its value might be huge, its constitutional significance is less prominent.<sup>65</sup> This does not remove the Internal Market's capacity, of course, to catch the hypocritical and outright illogical behaviour of the Member States, thus helping their adherence to the values on which integration is based: Laurence Gormley is right, 'the record of prostitutes in perhaps better in Community law than that of their clients'.<sup>66</sup>

To make a long story short, unlike in the case of states, EU's *raison d'être* cannot be presumed and is naturally contested, leaning towards technical market rules far removed from the values which Article 2 TEU promotes as fundamental. In this sense, Article 2 TEU is more of a restatement of the factual situation which seemed to be valid in the past, when all the Member States could boast adherence to the values listed therein – this is a situation which is conceptually different from relying on the same provision in the hope of receiving some guidance with regard to the values on which the Union rests.

53 E.g. Soldatos, P. and Vandersanden, G., 'L'admission dans la CEE – Essai d'interprétation juridique', *Cahiers de droit européen*, 1968, 691 (stating that the respect for democracy and the Rule of Law have always been unwritten conditions of joining the Communities since the inception of European integration).

54 See, for a meticulous analysis, de Witte, B., 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Alston, P. (ed.), *The EU and Human Rights*, Oxford: OUP, 1999, 859.

55 Since some scholars tended to see in the blackmail in question a reflection of legal pluralism, the common sense approach needed defense. See, for an intriguing example, Davies, G., 'Constitutional Disagreement in Europe and the Search for Legal Pluralism', *Eric Stein Working Papers* (Prague) No. 1/2010, 6.

56 Trachtman, J. P., 'Bananas, Direct Effect and Compliance', 10 *European Journal of International Law*, 1999, 655.

57 Case C-110/05 *Commission v. Italy* [2009] ECR I-519.

58 Joined Cases 115 & 116/81 *Adoui et Cornouaille* [1982] ECR 1665.

59 In which case even single mothers can be deported, the Court tells us: Case C-86/12 *Alokpa* [2013] nyr. The same applies to the fathers who are the only breadwinners: Case C-434/09 *McCarthy* [2011] ECR I-3375; Nic Shuibhne, N., 'Annotation of Case C-434/09 *McCarthy* and Case C-256/11 *Dereci*', 49 *Common Market Law Review*, 2012, 176.

60 Weiler, J. H. H., 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"', *Singapore Journal of Legal Studies*, 2012, 248.

61 There is no disagreement that the Member States are in charge of their constitutional systems, the EU's power in this field being virtually *nihil*. Moreover, the EU obviously has to respect and uphold the national constitutional specificity of the Member States, rather than undermine it: Article 4(1) TEU.

62 Menéndez, A.J., 'Whose Justice? Which Europe?', in Kochenov, D., de Búca, G., and Williams, A. (eds.), *Europe's Justice Deficit?*, *op cit*.

63 Kochenov, D., 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?', 62 *International and Comparative Law Quarterly*, 2013, 97.

64 For an argument that EU citizenship could eventually get there see e.g. Kochenov, 'The Citizenship Paradigm' (2013), *op cit*.

65 For a collective attempt of a number of the leading scholars and judges to rethink EU citizenship's potential critically see Kochenov, D. (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2015 (forthcoming).

66 Kapteyn, P. J. G., and VerLoren van Themaat, P. (Gormley, L.W. (ed.)), *Introduction to the Law of the European Communities*, 3<sup>rd</sup> English ed., The Hague: Kluwer Law International, 1998, 715.

## 6 Means hijacking the ends: The justice void

To state that the foundational aspirational idea of justice cannot be related to the market only, would be stating nothing new. Yet, this rather obvious insight puts the story of EU values into an uneasy perspective. Although the ideology of the four freedoms and Market Integration is at the Union's core at the moment, it is obvious that this has not always been the case, on which fact the majority of the students of integration would converge. In fact, the EU was created to bring about *peace and better life for all*, should we be faithful to the story of its first steps. A *fédération européenne*, to be brought about via the creation of the Internal (then Common) Market – should we believe the Schuman Declaration.<sup>67</sup> The integration exercise thus stood for something significantly more far-reaching than the idea of economic integration as such, *sensu stricto*. Although, the Union's ambition has gradually been scaled down to the market – call it a hijacking of the ends by the means<sup>68</sup> – *de facto* the Union's negative integration produced an intriguing side-effect. The Union – early on in its history – started playing the role of the promoter of liberal and tolerant nationhood, as rightly described by Will Kymlicka.<sup>69</sup> The EU thus came to be engaged in promoting a rather clear idea of constitutionalism<sup>70</sup> based on proportionality, the glorification of reasons, the idea that the law should make sense, as well as the basic mutual respect among the Member States.<sup>71</sup> This essentially came down to frowning upon the ideology of 'thick' national identities,<sup>72</sup> however glorified in some schoolbooks.<sup>73</sup>

The EU thus emerged as a vehicle of negative market-based approach to the 'justice' question, for which it is rightly criticized by e.g. Alexander Somek<sup>74</sup> and Andrew Williams,<sup>75</sup> among numerous others. Clearly, creating a market and questioning the state is not sufficient as a basis for a mature constitutional system,<sup>76</sup> potentially creating a justice void at the supranational level,<sup>77</sup> eventual positive outcomes notwithstanding.<sup>78</sup>

Given that the initial promise of integration is substituted by the Internal Market and assuming that market is not about justice<sup>79</sup> – even less so when justice is about the idea of justification in the market context<sup>80</sup> (i.e. *against* the standard of the market) – the EU simply cannot answer the *raison d'être* question on its own,

67 Weiler, J. H. H., 'The Schuman Declaration as a Manifesto of Political Messianism', in Dickson, J. and Eleftheriadis, P. (eds.), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012.

68 Kochenov, 'The Citizenship Paradigm' (2013), *op cit*.

69 Kymlicka, W., 'Liberal Nationalism and Cosmopolitan Justice', in Benhabib, S., *Another Cosmopolitanism*, Oxford: Oxford University Press, 2006, 134. See also Davies, G., 'Humiliation of the State as a Constitutional Tactic', in Amtenbrink, F., and van den Bergh, P. (eds.), *The Constitutional Integrity of the European Union*, The Hague: T.M.C. Asser Press, 2010.

70 For a brilliant analysis see Perju, V., 'Proportionality and Freedom – An Essay on Method in Constitutional Law', 1 *Global Constitutionalism*, 2012.

71 See, e.g., Bashkeska, E., *The Principle of Good Neighbourly Relations in EU Law*, Ph.D. thesis defended in Groningen, 2014.

72 For an analysis of some important consequences of these developments in the context of EU citizenship and Member States'-level nationality law, see, e.g., Kochenov, D., 'Member State Nationalities and the Internal Market: Illusions and Reality', in Nic Shuibhne, N., and Gormley, L.W. (eds.), *From Single Market to Economic Union*, Oxford, OUP, 2012.

73 Such glorification is necessarily losing ground in the context of EU integration and general globalization: Joppke, C., 'Immigration and the Identity of Citizenship: The Paradox of Universalism', 12 *Citizenship Studies*, 2008, 533.

74 Somek, A., 'Europe: Political, Not Cosmopolitan', 20 *European Law Journal*, 2013, 142; Somek, 'The Preoccupation of Rights' (2014), *op cit*.

75 Williams, *The Ethos of Europe* (2010), *op cit*.

76 Nic Shuibhne, N., 'The Resilience of EU Market Citizenship', 47 *Common Market Law Review*, 2010, 1597.

77 Kochenov, D., de Búrca, G., and Williams, A., 'Introduction', in Kochenov, D., de Búrca, G., and Williams, A. (eds.), *Europe's Justice Deficit?*, *op cit*, 1.

78 Davies, 'Humiliation of a State' (2010), *op cit*.

79 Nicol, 'Swabian Housewives' (2014) *op cit*; Menéndez, 'Whose Justice?' (2014) *op cit*.

80 Tsakyrakis, S., 'Disproportionate Individualism', in Kochenov, de Búrca, and Williams, (eds.), *Europe's Justice Deficit?*, *op cit*. But see, Neyer, *Justification of Europe* (2012), *op cit*; Neyer, J., 'Justice and the Right to Justification: Conceptual Reflections', in Kochenov, de Búrca, and Williams, (eds.), *Europe's Justice Deficit?*, *op cit*.

without external hints.<sup>81</sup> More importantly still, it does not have the procedures to come up with the answers. Equally, it is totally deprived of the grandeur and vision not to need any procedures. We are thus facing a justice void undermining the Union's justification and successful functioning: a justice deficit.<sup>82</sup>

All what Article 2 TEU mentions is about the prerequisites of the day-to-day operation of such a void, not about giving any answers, which naturally undermines the efforts of dealing with the Member States where the values mentioned in that provision suffer a breakdown.

## 7 The EU's structural inability to defend its founding values

The justice void underpinning EU integration coupled with the lack of procedures to discover and formulate the justice foundations of the Union could be among the logical explanations why Article 7 EU, designed to pressure the Member States viewed as departing from the values on which the Union is founded, contains a procedure, which is purely political: the European Court of Justice does not play a role and a lot of bargaining behind the scenes is possible, explaining why the provision has never been used. In the absence of any Union-level answers to the justice question – and given its limited competences, let alone absent procedures to come up with the answers that would be broadly legitimate while respecting the division of competences between the EU and the Member States – only the *Herren der Verträge* emerge as the sole source of authority to decide on such issues. Wojciech Sadurski explained quite clearly why Article 7 TEU is not a panacea also in practical terms.<sup>83</sup> There is no need to repeat his persuasive arguments here. Suffice it to say that in dealing with Article 2 TEU the EU seems to be in need of external input.

Moving beyond Article 7 TEU, ordinary enforcement mechanisms designed to ensure that EU law works in the Member States are always at our disposal.<sup>84</sup> Yet, the clear difference between the enforcement of the law and the enforcement of values is omnipresent in this context.<sup>85</sup> The fact seems to be that the EU not only suffers from its inability to answer the justice question, thus failing to provide a legitimate answer concerning what it stands for beyond the market – or a procedure to come up with such an answer by itself – but also any ability to enforce the values as mentioned in Article 2 EU in legal terms. At the same time, quite clearly, the importance of finding the ways of value-enforcement is crucial and will only grow in the EU: the current situation is by no means sustainable.<sup>86</sup>

## 8 Growing expectations

For many decades the Union has been consistently working against the *raison d'être* question, denying the very possibility that this question would ever arise, presenting itself as solely functioning within the paradigm of the Internal Market, which denies the very possibility of any serious treatment of the majority of the principles included in Article 2 TEU, since it builds on the justice void, thus denying the acuteness of the main problems, which plague the Union at the moment instead of trying to solve them.

It is only in the context of the preparation of the Eastern enlargement that a fascinating situation arose, when the EU *de facto* ended up seemingly enforcing its foundational values through the pre-accession

<sup>81</sup> On the discussion of where such hints could come from as well as on the interrelation between justice and democracy in the EU legal order see Neyer, J., 'Justice, Not Democracy in the European Union' (2010) 48 *Journal of Common Market Studies*, 903; Neyer, J., 'Who Is Afraid of Justice? A Rejoinder to Danny Nicol' (2012) 50 *Journal of Common Market Studies* 523; Nicol, D., 'Swabian Housewives, Suffering Southerners: The Contestability of Justice as Exemplified by the Eurozone Crisis', in Kochenov, de Búrca, and Williams, (eds.), *Europe's Justice Deficit?*, *op cit.*

<sup>82</sup> See, e.g. Walker, N., 'Justice in and of the European Union', in Kochenov, de Búrca, and Williams, (eds.), *Europe's Justice Deficit?*, *op cit.*

<sup>83</sup> Sadurski, 'Adding Bite to a Bark' (2010), *op cit.*

<sup>84</sup> For an overview why it does not necessarily help see Closa, Kochenov and Weiler, 'Reinforcing Rule of Law Oversight...' (2014), *op cit.*

<sup>85</sup> Kochenov, 'The Issue of Values' (2014), *op cit.*

<sup>86</sup> Closa, Kochenov, and Weiler, 'Reinforcing Rule of Law Oversight...' (2014), *op cit.*



conditionality policy – to highly questionable results. The Failure of Conditionality in the fields of democracy and the Rule of Law, which has been analyzed elsewhere,<sup>87</sup> now stands overwhelmingly proven by Hungarian developments. The message that the EU was projecting on candidate countries was that it would help them improve *tout court*. The promotion of the basic democratic principles and the Rule of Law – the values of Article 2 TEU – was presented as part of the package.

Crucially, not a single Western European Member State joined the Union on such a premise: the EU was founded as a celebration of the democratic nature of all the Member States as functioning democracies based on the Rule of Law. The enlarging EU, however, was expected to be a careful helper in the areas outside of its reach. The acceding states looked at the EU as a possible guarantor of future democratic stability, to ensure that Hungary never happens. It did. This radical difference in approaches has important implications for the whole EU integration project. Sadurski has brilliantly described this cleavage, covering the Council of Europe too in a recent monograph.<sup>88</sup> The developments in Hungary thus provide an illustration of how the EU – quite expectedly – fell short of the growing expectations of the new Member States in failing to guarantee that they stay the course of freedom and Article 2 TEU values.

## 9 The biggest crisis in Union's history

All the problems described, the hijacking of the grand idea of European unity by the internal market ideology, the EU's inability to answer the *raison d'être* question as well as the structural justice void, coupled with the Member States' growing expectation of action, led to the biggest crisis in EU history since the Union's creation. Indeed, the real systemic crisis is in the current Hungarian situation, not the state of the EMU, failed referenda, or the blockages by the Member States in the past, like the empty chair policy. All the EMU and empty chair problems can be solved by the EU in the context of the familiar legal field.

The Hungarian situation – which can of course repeat itself in other Member States too<sup>89</sup> – is markedly different: although the values of Article 2 TEU are of essential legal significance, the Union is powerless in what concerns their enforcement and, more importantly, also their content. In fact, talking about enforcing them seriously amounts to nothing else but conceding that the presumption that all the Member States form a level playing field in terms of democracy, the Rule of Law etc. does not always hold – something the European Court of Human Rights has already clearly hinted at in *M.S.S. v. Belgium and Greece*.<sup>90</sup> Acknowledging this alongside EU's obvious powerlessness as far as values are concerned is a potentially explosive combination in the Union built on Member State equality and the principle of mutual recognition.<sup>91</sup>

In the context of the current crisis we are not dealing with a Member State revolting, for one reason or another, against a binding norm of European law. At the level of values, we are dealing with a *principally different Member State*: the Belarusianisation<sup>92</sup> of the EU from the inside is easily observable. This goes as far as making the ordinary operation of the ordinary *acquis* currently in force absolutely impossible. Once the principles of Article 2 TEU are not observed, the essential presumptions behind the core of the Union do not hold any more, undermining the very essence of the integration exercise.

87 Kochenov, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer Law International, 2008.

88 Sadurski (2012), *op cit*.

89 There seems to be no reason to believe that only the new Member States are likely to suffer Hungary-like shortcomings, however, contrary to what has been claimed in the literature: Müller, J.-W., 'Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Members', *Foreign Affairs*, March/April 2014.

90 European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09 [2011].

91 Authors discussing the 'horizontal-Solange' – i.e. granting the Member States a 'self-help' possibility – thus threaten to disrupt the functioning of the EU entirely: Canor, I., 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"', 50 *Common Market Law Review*, 2013, 383. On inadmissibility of 'self-help' in the context of EU law, see, Joined cases 90 and 91/63 *Commission v. Belgium and Luxembourg* [1964] ECR 626.

92 Belavusau, U., 'Case C-286/12 *Commission v. Hungary*', 50 *Common Market Law Review*, 2013, 1145.



This article made clear that the crisis of values in the EU is very different from other obstacles faced by the EU in the past in a number of important respects, hitting at the very core of what the Union – and its law – is about. Crucially, the crisis of values naturally connects with a whole array of profoundly problematic issues, which are not popular among bureaucrats and politicians, such as, in particular, the EU's *raison d'être* question or the discrepancy between the Member States' expectations and the EU's ability to deliver in the areas touched upon by the values on which the Union is built. Popular ways of dealing with these issues range from appealing to old questionable myths to simply interpreting the very questions away. Such methodology is entirely unhelpful in dealing with the crisis we are facing and will have to be profoundly revised. That the crisis has deep roots and far-reaching implications does not mean, however, that it cannot be solved. It is certain, however, that solving it will not be easy and will necessarily require going to the core of what the EU is and is *not* about. All what has been done so far is profoundly insufficient, as all the moves taken until now both failed to bring about change and to tackle the crucial questions underlying the crisis. Reversing the Union's approach is crucial, as we are dealing with one of the worst crises in EU's history.